The court went on to note that;

> "By the fact that all these records are missing, that there might be some source, there may be some bad faith here. And that to the extent that there are missing records, that stymies (petitioner's) investigation."

The court again indicated that respondent should get the file and adjourned the trial for that purpose.

On the adjourn date, the respondent indicated that they could not find any other file. McFaddan thereafter testified that after he took over the investigation he prepared additional papers and/or reports in regard to the investigation and they have not been found. It should be noted that other than indicating that there was an extensive search for the documents, the respondent did not proffer any reason indicating the basis for the failure to produce the records.

In it's decision the court acknowledged, " there are documents that are absent" but went on to state "the failure to produce a document can't be the basis for a finding. It must be other material to lead to that inference." the petitioner submits that the court was fully justified and should have made an adverse inference finding that the totally unexplained reason for the missing documents supported the petitioner's bad faith claim. After acknowledging that the petitioner was hampered in establishing bad faith because of the missing records, thus finding a direct relationship between the missing records and the

petitioners ultimate burden at the hearing, it is unclear how the court could then go on to indicate that something more was needed to permit it to make an adverse inference.

As stated by U.S. Supreme Court Justice Stevens when concurring in judgment in the matter of Illinois v. Gregory Fisher, 540 U.S. ___(2004),

> "there may well be cases in which the defendant is unable to prove that the State acted in bad faith but in which the loss or destruction of evidence is nonetheless so critical to the defense as to make a criminal trial fundamentally unfair."

Although this case is not a criminal case, it does involve a secret police investigation into alleged criminal activity. All the other factors are there; bad faith, lost evidence and a fundamentally unfair hearing. The hearing judge acknowledged how crucial the missing investigative folder was. Ironically the original burden of proving bad faith was hampered by an additional burden of proving bad faith on the part of the Police Department's loss of the documentary evidence. The petitioner is not facing a loss of liberty, but his loss of property issue is extreme. At stake is petitioner's livelihood, a lifelong pension with medical benefits and a career involving a circle of friends.

As stated by the New York State Court in matter of Thomas v. Abate, 213 A.D.2d 251, 623 N.Y.S.2d 870

(1st Dept 1995), A probationary employee can be dismissed without a hearing and without a statement of reasons in the absence of any demonstration that dismissal was for a constitutionally impermissible purpose or in violation of statutory or decisional law. (Matter of York v. McGuire, 63 N.Y.2d 760, 480 N.Y.S.2d 320) judicial review of such a determination is limited to an inquiry as to whether the termination was made in bad faith (Matter of Johnson v. Katz, 68 N.Y.2d 649, 505 N.Y.S.2d 64), and the petitioner bears the burden of raising and proving such bad faith..." (Matter of Cortijo v. Ward, 158 A.D.2d 345, 551 N.Y.S.2d 36)."

Petitioner-Appellant, in exchange for the negotiated disposition of disciplinary probation, gave up certain rights in the belief that the Police Department would treat him fair and act in good faith. Although case law uniformly holds that "absent a showing of bad faith, police officers on disciplinary probation, like those on ordinary probation, can be terminated for any or no reason (see Matter of Wilson v. Bratton, 699 N.Y.S.2d 29, 31)." Matter of Dillon v. Safir, 704 N.Y.S.2d 568 (1st Dept. 2000), as evidenced by Captain Croke's testimony, wherein he indicated that he never recommended termination if the officer did not do anything, and in fact, petitioner's termination was apparently based upon the allegations contained in the UF-49. Termination in practice occurs when the offending officer engages in further misconduct. Likewise, the New York State Court has uniformly found in cases alleging bad faith, their was "evidence

in the record of disciplinary problems other than that underlying the probation that would support the conclusion that the termination was in good faith." Matter of Dillon v. Safir, supra p. 569. See also Matter of Wilson v. Bratton, supra (allegations of lateness); Matter of Medina v. Sielaff, 182 A.D.2d 424 (1st Dept. 1992) (petitioner admitted she was off post and in an unauthorized section of the prison). In the Matter of Kroboth v. Sexton, 160 A.D.2d 126, 560 N.Y.S.2d 6 (1st Dept. 1990), the New York State Appellate Division reversed the lower court's determination and reinstated the petitioner after a finding that the Sanitation Department acted in bad faith in dismissing the petitioner within three weeks of his successful completion of the Departments own alcohol abuse program. In rendering it's decision, the court found that "Petitioner should have been lauded, not fired, and permitted to work through his probationary period given that his work was apparently satisfactory and he committed no further infraction after the treatment."

Summary of argument

It is an acute perversion of employment law when a city employer can terminate a city employee with over 13 years invested for an administrative error on the cities part regarding a summons which was issued and adjudicated by the city which the employee had paid and satisfied years earlier. Likewise, in regard to the charge of patronizing a prostitute, to have the investigator concede on the record "it is quite possible

that (petitioner) is not the man who was in the car with the (prostitute)', bespeaks malfeasance in the conduct of the investigation, and at the very least, gross negligence. To have the Executive Officer of the Employee Management Division of the New York City Police Department acknowledge that petitioner's termination can not only be based upon, but actually justified by false allegations, is a perversion of due process and smacks of bad faith. After petitioner patiently waited seven years for his day in court in order to clear his name and prove the Department acted in bad faith in terminating him, respondent showed up without the investigative file which successfully halted petitioners questioning of the investigator and an inquiry into the motives of why numerous procedures were disregarded and obvious conflicting evidence was ignored by highly trained detectives. Respondent offered no explanation as to the loss of the file and although petitioner objected to the totally unexplained failure to produce records of the investigation and the hearing judge acknowledged the definitive importance of such a file in this case, the court took no action at all.

REASONS FOR GRANTING THE PETITION

This is a case of abuse of power and then a cover up by the Internal Affairs Bureau of the largest Police Department in the United States. A unit which is in charge of protecting citizens from corrupt and abusive Police Officers. It performs internal investigations and according to an NYPD Police student guide entitled "Internal Affairs Bureau" which reads; "This unit also reviews all of the completed investigations to assure that all necessary and proper investigative steps have been taken within the framework of legal guidelines and Departmental policies." It is alarming how far IAB strayed from their own mission in this case and who is to say what they would be capable of if left unchecked. If the officials in charge of police integrity can erroneously accuse one of their own without being held accountable, what signal does that send law enforcement nationwide? Each year, thousands of Americans will enter Police civil service employment positions on a probationary status and although there is a need to weed out those who are not capable of handling the high standards required of the job. The government has a responsibility to protect the constitutional rights of those who do honorably succeed at completing the probationary period. A secret confidential internal affairs investigation which is responsible for ending a mans career should certainly be subject to review by the courts to assure no bad faith was involved.

When it is found by the court that the investigation was inept with no reasonable explanation as to why, the court cannot simply forgive the respondent when it inexplicably loses the investigative file evidence. This leaves the petitioner with no where to turn and denies him his right to due process. I believe the danger of leaving this issue unchecked is the potential for these "secret police" to initiate confidential investigations at will; against any employee that they wish to eradicate for what ever reason. In this case, members of the Internal Affairs Bureau illegally shifted the power of deciding who is terminated from the "discretion of the Police Commissioner" to themselves. It is outrageous that a simple anonymous phone call could trigger one of these lopsided internal investigations which the Police Commissioner ultimately relies on in making his decisions. The implications of a ruling in this case would go beyond Employment Law, it could help set standards in how internal police investigations are conducted, without infringing on the subject's Constitutional rights and without falsely accusing those with the job of protecting the rights of all Americans.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

MARK WEIR

February 16, 2005

Buckley, P.J., Sullivan, Williams, Gonzalez, JJ.

2862-
2862A-
2862B In re Mark Weir,
Petitioner-Appellant,

Edwin Ira Schulman

-against-

William Bratton, etc.,
Respondent-Respondent.

Mordecai Newman

Order and judgment (one paper), Supreme Court, New York County (Walter Tolub, J.) entered November 22, 2002, which, after a hearing, denied petitioner's application to annul respondent Police Commissioner's termination of petitioner's employment as a probationary police officer, and dismissed the petition, unanimously affirmed, without costs. Appeals from order, same court and Justice, entered October 16, 2001, and order, same court (Beatrice Shainswit, J.), entered December 19, 1996, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

Petitioner fails to satisfy his burden of showing that his dismissal while on disciplinary probation was in bad faith (see Matter of Dolcemaschio v. City of New York, 180 AD2d 573, 575, Matter of Prestia v. Brown, 191 AD2d 224).

APPENDIX A

Respondent's claim that petitioner solicited a prostitute is based on its surveillance and questioning of the woman he was seen with. At best, petitioner's evidence at the hearing showed that the IAB officers misidentified him. If so, respondent's reliance on their report, without ever questioning petitioner about the incident, would not amount to bad faith. Similarly, respondent's claim that petitioner was driving with a suspended license is based on a possibly erroneous DMV report. If so, respondent's reliance thereon, without questioning petitioner about his license, would not amount to bad faith.

THIS CONSTITUTES THE DECISION AND ORDER OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED FEBRUARY 17, 2004

"s/ Catherine O'Hagan Wolfe".
CLERK

APPENDIX A

NOTICE OF APPEAL NUMBER 3369 DATED DECEMBER 23, 2002, PRE-ARGUMENT STATEMENT, ORDER, NOTICE OF ENTRY

At an IAS part 15 of the Supreme Court of The State of New York, held in and for the County of New York, at the Courthouse, located at 60 Centre Street, New York, New York, on the 8th day of August, 2002.

PRESENT: HON. WALTER TOLUB
JUSTICE

----------x

In the Matter of the Application of
MARK WEIR, index No. 102719/96

Petitioner,

For the Judgment and Order Pursuant To Article 78 of the Civil Law and Rules

ORDER AND JUDGMENT

- against -

WILLIAM BRATTON, COMMISSIONER
NEW YORK CITY POLICE DEPARTMENT,

Respondent.

----------x

APPENDIX B

Petitioner herein having commenced a special proceeding pursuant to CPLR Article 78 seeking a judgment (a) vacating Respondent's decision terminating Petitioner's employment as a police officer with the New York City Police Department ("NYPD") effective October 10, 1995, and (b) directing and compelling Respondent to reinstate Petitioner to the position of police officer with the NYPD; and the proceeding having duly come on to be heard before this Court on March 11, 2002 and April 1, 2002;

NOW, upon reading and filing the Notice of Petition dated February 9, 1996; the Verified Petition, verified on February 9, 1996, and the exhibits annexed thereto; the Memorandum of Law in Support of Petition and in Opposition to Motion to Dismiss, dated November 6, 1996; the Motion to Renew and Re-Argue, dated April 8, 1997; the Verified Reply, verified April 2, 1997, and the exhibit annexed thereto; the Affidavit of Mark Weir, sworn to April 4, 2001 and the exhibits annexed thereto; and the Memorandum of Law in Support of Petition, dated April 4, 2001, all submitted in support of the Verified Petition; the Notice of Cross-Motion to Dismiss Verified Petition, dated September 6, 1996; the Memorandum of Law, dated September 10, 1996 and the exhibit annexed thereto; the Reply Memorandum of Law, dated November 22, 1996; the Order issued December 17, 1996 granting in part Respondent's cross-motion to dismiss Verified Petition; the Verified Answer on behalf of Respondent, verified on January 29, 1997, and the exhibits annexed thereto;

APPENDIX B

and the Petitioner having appeared by Carroll & Friess; and the Respondent having appeared by Michael A. Cardozo, Corporation Counsel of the City of New York, by Neil Rosolinsky and Jeffrey S. Dantowitz, assistants Corporation Counsel; and the Court having considered the testimony presented at the hearing on March 11, 2002 and April 1, 2002, and the evidence introduced thereat; and due deliberation having been had thereon;

NOW, upon the motion of Michael A. Cardozo, Corporation Counsel of the City of New York, attorney for the Respondent, it is hereby

ORDERED AND ADJUDGED, that for the reasons stated on the record on April 1, 2002, Petitioner's application is denied in all respects, and the Petition herein is denied in its entirety and dismissed with prejudice.

ENTER:

"s/ Walter B. Tolub".
J.S.C.
WALTER B. TOLUB

"s/ XXX".
CLERK

FILED
NOV 22 2002
COUNTY CLERK'S OFFICE
NEW YORK

APPENDIX B

At an IAS Part 15 of the Supreme Court of the State of New York, held in and for the County of New York, at the Courthouse, located at 60 Centre Street, New York, New York.

PRESENT: HON. WALTER TOLUB
JUSTICE

----------x

In the Matter of the Application of
MARK WEIR, Index No. 102719/96
Petitioner,

-against-

WILLIAM BRATTON, COMMISSIONER NEW YORK CITY POLICE DEPARTMENT,
Respondent.

----------x

EXCERPTS OF THE HEARING MINUTES HELD ON APRIL 1, 2002.

Proceeding

THE COURT: Okay. Well, my problem here is, basically, that I think, Mr. Friess, that you and your client have made out a great case for sloppiness. The problem is that you haven't made out a case for bad faith.

APPENDIX C

I understand that there are documents that are absent. There are witnesses that haven't been called, but that is not something I can correct at this point. The failure to produce a document can't be the basis for a finding. It must be other material to lead to that inference. The burden is your burden. The burden of presenting legal and competent evidence to show a deprivation of the Petitioner's rights or bad faith or other arbitrary action constituting an abuse of the commissioner's discretion must be born by the Petitioner. Insufficient evidence has been submitted to raise a triable issue of fact to support your claim of bad faith, improper motive, arbitrariness or capriciousness. I think you made a great case out for sloppiness, and certainly, with the benefit of hindsight, perhaps the officer should have done a better investigation. However, we are going towards bad faith. It was a hard thing to prove from the beginning. It hasn't been made easier by the lack of documents, but that doesn't fill in the blanks. You had the opportunity to -- hopefully, to go, or you would have gone after some of the supervisory personnel who made the decisions in this case. I don't know whether they are or are not available. In either case, you failed to sustain your burden in this regard, and the petition must be dismissed. You made a good record, though. Perhaps the Appellate Division will see it differently.

ADAM H. ALWEIS - SENIOR COURT REPORTER

APPENDIX C

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY : IAS PART 10

----------X

In the Matter of the Application of
MARK WEIR,

Index No.
102719/96-00

Petitioner,

cal. # 242 -
6/10/96

For a Judgment under Article 78 of
the Civil Practice Law and Rules

- against -

WILLIAM BRATTON, COMMISSIONER NEW
YORK CITY POLICE DEPARTMENT,

Respondent.

----------X

BEATRICE SHAINSWIT, J.:

Petitioner brings this Article 78 proceeding to annul his termination from the New York City Police Department on the ground that the termination was arbitrary and capricious. Respondent cross-moves to dismiss the petition.

APPENDIX D

Petitioner was a tenured police officer. On May 5, 1994, he was served with a disciplinary charge stemming from an August 7, 1993, incident, when he failed to safeguard his firearm. He received a Command Discipline (formal reprimand) and forfeited one day's pay. On June 14, 1994, petitioner was served with a disciplinary charge stemming from a June 10, 1994, incident, where another failure to safeguard his weapon resulted in injury to a civilian. Petitioner was suspended without pay, because of this incident, from June 14, 1994, through July 8, 1994.

On July 26, 1994, petitioner signed a plea agreement covering both incidents. Under this agreement, petitioner was placed on dismissal probation for a period of one year and forfeited 30 vacation days. The period of dismissal probation started on October 14, 1994. On October 5, 1995, he was suspended without pay. By a letter dated October 12, 1995, he was notified that he was dismissed, effective October 10. He states he received the letter on October 23, 1995.

Petitioner, asking for reinstatement, contends that his termination was arbitrary and capricious. He also contends that it was illegal, because it essentially re-imposed a second penalty for the first of his two infractions, and because it was imposed after the expiration of his one-year probationary period. Finally, he contends he was coerced into signing the agreement.

APPENDIX D

At the outset, the court rejects petitioner's claim that he was coerced into signing the agreement. The agreement specifically stated that it "was executed voluntarily without duress or coercion, express or implied." Furthermore, petitioner was represented by counsel when he executed the agreement.

Nor can petitioner claim that his termination impermissibly punished him twice for the first of two incidents. The agreement explicitly states that petitioner fully understood the nature and the terms of the plea, and that he waived any and all rights granted to him under the laws of the City and State of New York. Petitioner, after discussing the agreement with his attorney, cannot now challenge specific provisions within the agreement.

Petitioner's timeliness argument is meritless as well. The agreement specifically allowed respondent to dismiss petitioner at any time during the probationary period. This period ended on October 14, 1995. The dismissal letter was issued on October 12, 1995, and was effective October 10, 1995. Both dates were within the probationary period, and petitioner submits no authority that the receipt of the letter also was required to be within the probationary period.

Based on the foregoing, the cross-motion to dismiss is granted as to the first through the fifth claims alleged in the petition.

APPENDIX D

However, the cross-motion is denied as to the sixth claim, which alleges the termination to be arbitrary and capricious. There is no dispute that petitioner was a probationary officer at the time of his termination. A probationary employee may be terminated without reason [Talamo v. Murphy, 38 NY2d 637 (1976)]. A court's inquiry is limited to whether the termination was arbitrary or capricious, or made in bad faith [Dolcemaschio v. City of New York, 180 AD2d 573 (1st Dept. 1992)]. The current record does not permit the court to make such an inquiry. Respondent first suspended and then terminated petitioner on the eve of the expiration of the probationary period. It is not clear whether these actions were precipitated by separate charges [see Prestia v. Brown, 191 AD2d 224 (1st Dept. 1993)].

Accordingly respondent is directed to serve a verified answer to the sixth claim in the petition within 20 days after service of a copy of this order with notice of entry. Counsel for both sides are directed to re-calendar the petition, as amended by this order, and the answer for determination on its merits.

FILED
DEC 19 1996
COUNTY CLERK'S OFFICE
NEW YORK

Dated December 17, 1996

"s/Beatrice Shainswit".
J.S.C.

APPENDIX D

State of New York
Court of Appeals

At a session of the Court, held at Court of Appeals hall in the City of Albany on the eighteenth **day of** November 2004

Present, HON. JUDITH S. KAYE, Chief Judge presiding

1-10 Mo. No. 872

In the Matter of Mark Weir,
Appellant,

V.

William Bratton, &c.,
Respondent.

A motion for leave to appeal to the Court of Appeals in the above cause having heretofore been made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is **ORDERED**, that the said motion be and the same hereby is denied.

"s/Stuart M.Cohen".
Stuart M. Cohen
Clerk of the Court

APPENDIX E